IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 658.

UNITED STATES OF AMERICA, To the Use of NOLAND COMPANY, INCORPORATED, A Corporation, *Petitioner*,

v.

ALEXANDER D. IRWIN AND ARCHIBALD O. LEIGHTON, Trading as IRWIN & LEIGHTON, and UNITED STATES GUARANTEE COMPANY, A Corporation, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

PETITION FOR REHEARING.

PRENTICE E. EDRINGTON,
AMASA M. HOLCOMBE,
Attorneys for Respondents.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Now come respondents and petition the Court to grant a rehearing in the above entitled and numbered cause decided April 6, 1942, to the end that grievous errors in said opinion be corrected, and for grounds for the granting of said rehearing, respondents show:

I. That the Court erred in holding that the words "*public building or public work of the United States*" as specifically used in the Miller Act of August 24, 1935, are equivalent in meaning to "*public works*" as used in the National Industrial Recovery Act of June 16, 1933.

II. That the Court erred in holding that Congress in enacting the National Industrial Recovery Act of June 16, 1933 intended to make a new definition of "public works" for purposes outside of the scope of said Act.

III. That the Court erred in giving any consideration to what the Court termed "the 'strong equities' of petitioner's case," when no basis therefor is found in the record.

WHEREFORE, respondents pray that on the above grounds, as amplified by the appended brief, the opinion rendered herein be vacated and that a rehearing be granted, and for general and equitable relief.

PRENTICE E. EDRINGTON,
AMASA M. HOLCOMBE,
Attorneys for Respondents.

BRIEF IN SUPPORT OF PETITION FOR REHEARING.

I.

The Court Erred in Holding That the Words "Public Building or Public Work of the United States" as Used in the Miller Act Are Equivalent in Meaning to "Public Works" as Used in the National Industrial Recovery Act.

The decision in this case mutilates principles which have long been regarded as basic law. Few doctrines have been more universally accepted than those recognizing the definition of "a public work of the United States."

This Court in its opinion, after stating the facts and the statutes applicable to this dispute, states the issue as follows:

> "The question before us therefore is whether the construction of the library was a 'public work' as that term is used in the Miller Act."
>
> . . . . . .
>
> "No aid in ascertaining the meaning of 'public work' is to be found in the Miller Act itself. But in the National Industrial Recovery Act, passed two years before the Miller Act, Congress defined it as including 'any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public.'" (Opinion, p. 4.)

In the foregoing statement the Court not only ignored the specific language of the Miller Act, which restricts its scope to public works "of the United States," but the Court also failed to note that the "public works" provided for in the National Industrial Recovery Act include two classes of projects of entirely distinct character, which the Administrator of Public Works respectively termed "Federal Projects" and "Non-Federal Projects" for purposes of administration, and the latter class of which does not include any projects that are in fact public works of the

United States or that have ever been in law considered to be public works of the United States.

The distinction drawn between Federal and Non-Federal projects in the administration of the National Industrial Recovery Act and the character of each, is clear from the following excerpts from the testimony of John J. Madigan, Public Works Administration Official, called by petitioner as a witness:

Direct Examination by Mr. Heron:

"Do you know whether or not this bulletin No. 51, revised October 1, 1935, was promulgated generally among the executive departments of the Government?

"A. It was in connection with Federal projects.

"Q. Can you tell me whether or not the building of the Library building at Howard University was a Federal project or a non-Federal project?

"A. From my point of view this was a project known as a Federal project as contrasted with the non-Federal projects.

"Q. Do I understand that the activity of the Public Works Administration was divided generally into Federal and non-Federal projects?

"A. That is right. (R. p. 101.)

Cross Examination by Mr. Edrington:

"Q. That is your only reason for stating it is a public work of the United States, because Mr. Ickes placed it in that category?

Objection by Mr. Heron: I object. Witness did not say it was a public work of the United States, but a Federal project.

"Q. I correct my question. Your only reason for saying it is a Federal Project is because Mr. Ickes as Administrator of Public Works placed it in that category?

"A. We have two types of projects under the Public Works Administration, non-Federal and Federal, and I know the project to which you refer is not one of those in any of our non-Federal lists.

"Q. Non-Federal projects—what types of projects are they?

"A. All types of projects—buildings of various kinds, sewers, etc.

Q. It includes school houses, court houses etc. in municipalities, cities and states?

"A. Yes. (R. p. 102-103.)

The important thing to be noted in the foregoing testimony is that all of the projects mentioned by witness are "public works" within the scope of the National Industrial Recovery Act, but not all of them are "public works *of the United States*" because many are in fact state and municipal projects not owned by the United States.

Thus it is shown by the record in this case that the term "public works" used in the National Industrial Recovery Act, as interpreted by those charged with the administration of the Act, far transcends the class of projects that can be described as "public works of the United States" and this Court's opinion that the two expressions are synonymous not only does violence to the plain meaning of the definite words of ownership in the Miller Act, but ignores the long line of decisions interpreting the Heard Act as inapplicable to the Miller Act notwithstanding that the restrictive language of the Miller Act so obviously is predicated thereon. *Title Guarantee Co.* v. *Crane Co.*, 219 U. S. 24; 23 Op. Atty. Gen'l 174; *United States* v. *Faircloth*, 49 D. C. App. 323, 265 Fed. 963; *United States* v. *Empire State Surety Co.*, 100 N. Y. Supp. 247; *Penn Iron Co.* v. *Trigg*, 106 Va. 557, 56 S. E. 329; *Maiatico Constructing Co.* v. *United States*, 65 D. C. App. 62, 79 F. (2nd) 418, cert. denied 246 U. S. 649.

Specifically, the question for decision is: By providing explicitly that the bond provisions of the Miller Act shall extend only to "a public building or a public work *of the United States*" has the Congress, following the Courts, withheld the benefits of the Act in classes of "public works" NOT public works *of the United States*.

So far as its language conveys ideas, the Miller Act affords no intimation that Congress intended anything more than this question postulates, and while the words of the statute do not by themselves distil its meaning, the Court

should at least begin with them rather than substitute for them the words of another Act having a much broader purpose and range.

When Congressman Duffy of Ohio at the hearings stated, as remarked by the Court (Op. p. 5): "If this bill is passed by this Congress it would certainly be applicable to the public works program and that is the reason for its importance," he evidently had reference to one of several bills introduced and under consideration, viz: H. R. 2068 (R. 34-35); H. R. 5054 (R. 42-43, et seq.); or H. R. 6115 (R. 48-49-50). The latter two provided:

> "That hereafter any person or persons entering into a formal contract with the United States for the construction of any public work or for repair upon any public building or public work, shall be required . . . to execute the usual penal bond . . . to insure to the benefit of any mechanic, materialman, etc."

Obviously he was advocating those bills which followed the wording of the Heard Act and which did not restrict their provisions for bonds in favor of third parties furnishing labor and material to "public buildings and public works of the United States." If Congress had in fact enacted one of the above cited bills and had failed to restrict the language of the enacted bill as it did in the Miller Act, then this Court might logically hold that it was intended to cover any public work listed and described in the NIRA. But Congress did not adopt any of these all-inclusive bills; but, on the contrary, enacted H. R. 8519 which by its specific wording restricted its provisions to public buildings and public works *of the United States*.

Congress in thus choosing between these bills, thereby restricting the Miller Act to public works "*of the United States*," evidently wanted to avoid any implication that the provisions of the Miller Act were applicable to "public works" generally which otherwise might have arisen because of the more inclusive meaning of "public works" in the NIRA.

II.

The Court Erred in Holding That the Congress in Enacting the National Industrial Recovery Act Intended to Make a New Definition of "Public Works" for Purposes Outside the Scope of Said Act.

In enacting the National Industrial Recovery Act in 1933 the Congress did not incorporate therein a new definition of public works. The main purpose of the Act was to increase employment throughout the States by the construction of public works. Accordingly Congress appropriated $3,300,000,000.00 and listed the types of public works to be constructed which included a comprehensive program of construction of projects, some of which were "Federal" and were *in fact* public works *of the United States* while others were "non-Federal" and did not *in fact* belong to the United States. The public works *of the United States* authorized by that Act and classified by the Administrator of Public Works as "Federal" were described in the Act as (a) construction, repair and improvement of . . . public buildings and any publicly owned instrumentalities or facilities; (b) conservation and development of natural resources such as construction of river and harbor improvements, construction of naval vessels. These and many other Federally owned projects not fully enumerated herein were *in fact public works of the United States.*

Also authorized by said Act and classified by the Administrator of Public Works as "non-Federal" were projects of any character heretofore eligible for loans under subsection (a) of Section 604b, Title 15, U. S. C. That subsection included projects of states, public agencies of states, public corporations, boards and commissions, and private corporations engaged in constructing bridges, tunnels, docks, viaducts, water works and markets devoted to public use and self-liquidating in character. The National Industrial Recovery Act authorized projects carried on by public authority or with public aid to serve the interests of the gen-

eral public, such as the library building involved here. These were all non-Federal public works which did not belong to the United States and were NOT "public works of the United States" giving these words their usual meaning.

Furthermore, the action of the Administrator of Public Works in classifying Howard University Library as a Federal Public Work, and of the Court in considering the Library as a public work *of the United States*, within the meaning of the Miller Act, are in square contravention of the intent of the Congress as actually expressed in the NIRA, Sec. 203(c), 40 U. S. C. A. 403(c) where the clear distinction is made between Federal public works and other non-Federal public works authorized by the NIRA. This last cited Section provides:

> (c) In the acquisition of any land or site for the purposes of Federal Public Buildings and in the construction of such buildings provided for in this chapter, the provisions contained in sections 305 and 306 of the Emergency Relief and Construction Act of 1932, as amended, shall apply.

Sections 305 and 306 of the Emergency Relief and Construction Act (40 U. S. C. A. 258a) provided for a short method of condemnation of lands for the public use of the United States, but they were not invoked in the construction of the Library building on land owned by Howard University notwithstanding the statute prohibiting construction of public buildings of the United States on private property (40 U. S. C. A. Sec. 255).

Therefore, if the Howard University Library were properly classified by the Administrator of Public Works as a Federal Public Work or Building, the Assistant Secretary of the Interior violated the provisions of Section 203(c) of the NIRA in not following the requirements of the Act of 1932 by condemnation of the site before commencement of the work of construction; but obviously the error was not that of the Assistant Secretary of the Interior because the Howard University Library is not a public building of the United States and should not have been so classified.

If, as the Court has erroneously concluded in its opinion, the Congress had intended to include within the scope of the Miller Act passed in 1935 (two years after the enactment of the NIRA) all of the works described in the NIRA it would have necessarily adopted the language of the Heard Act, the provisions of which were applicable to "any public building" or "public work," instead of limiting its provisions to "public buildings and public works *of the United States.*"

Whatever was the intention of Congress in 1933 by the use of the general words "public works" in the NIRA, this intention underwent a distinct change and alteration in 1935, for in the Miller Act the Congress specifically added to the words "any public building or public work" of the Heard Act the restricting words "of the United States." This clearly demonstrates and should be persuasive that Congress in enacting the Miller Act in 1935 did not legislate with regard to public works as that term is generally used in the National Industrial Recovery Act with reference to "Federal" and "non-Federal projects," but was legislating with specific reference to certain public works which were *in fact* public buildings and public works "of the United States."

It is difficult to follow the reasoning of the opinion in pointing out that the Miller Act enlarged the provisions of the Heard Act when, as a matter of fact, the Miller Act restricted its provisions to public works *of the United States.* This specific restriction, viewed in connection with other bills before the committee which followed the language of the old Heard Law, can only be interpreted as meaning that the lawmakers were restricting the scope of the Miller Act to those laborers performing labor on and materialmen supplying material to projects belonging to the United States, and excluding such claimants from the provisions of the Miller Act who worked on or supplied material to "non-Federal" projects, thus setting at rest the uncertainty, if any, concerning the applicability of local lien laws to such non-Federal public works.

Notwithstanding the like views expressed by the Courts in the *Maiatico* and *Peterson* cases to the contrary, we do

not quibble with the Court in holding that the library building at Howard University was a "public work" in that it served the interest of the general public. A Carnegie Library donated to a city may be a public work serving the interest of the general public in that community, but we contend that it is not a public work of the United States. We are confident that this Court could not hold the provisions of the Miller Act applicable to such a library project even in the case where Congress appropriated money in aid of its construction.

It is significant to note that the Court does not anywhere in its opinion hold the library building at Howard University to be a "public work *of the United States.*" Thus it is apparent that the Court has inadvertently overlooked the crux of the case so far as the applicability of the Miller Act is concerned. In holding, as the Court has in its opinion, that the library is a "public work" within the alleged definition contained in the National Industrial Recovery Act, which preceded the Miller Act by two (2) years and is not the latest expression of legislative intent on the issues of this case, the Court has failed to give any import, or even consideration, to the latest intention of the Congress on this subject as clearly expressed in the Miller Act which specifically restricts its provisions to public buildings and public works "*of the United States.*"

In view of the admitted status of Howard University, the Court cannot conscientiously bring itself to hold that said library building is *in fact* a "public building or public work *of the United States.*" To do so would do violence to the well considered and established opinion of this Court and the Attorney General of the United States cited with approval in footnote 7, page 5 of the Court's opinion. There the Court agrees with the correctness of the proposition that title to the building or project or to the land on which it is situated must be in the United States to make the building or project a *public work of the United States.*

For the purpose of deciding this case, as correctly held by the lower Court, the Miller Act adds nothing over the

Heard Act to petitioner's right to recover. If it can maintain its action under the terms of the Miller Act, it could under the same circumstances maintain it under the Heard Act prior to its repeal. In either case, the *sole* question would be whether an action could be maintained on a bond taken by the United States to secure the payment of laborers and materialmen in the construction of a building which was *not* a *public building of the United States* (R. 134). Since this Court by inference concedes that the library is *not a public building of the United States*, the Miller Act by its very terms has no application to it and the Court is unwarranted to go outside of the Miller Act to decide its application to the issues presented here.

The Administrator of Public Works erred in classifying the library building at Howard University as a "Federal project" when it was in fact, as proven herein, not a public building or public work of the United States. Certainly no power exists in the Administrator of Public Works under the National Industrial Recovery Act to change the character of a private building arbitrarily to that of a public building of the United States if it is not so in fact. The specific authority of Congress is required for a Government Official even to accept a donation of private property to the United States, and the seizure of private property is hedged about by conditions which did not exist in the case of the Howard University library building and did not justify its classification as a public building of the United States so long as the title remained in Howard University, a private corporation.

It follows that petitioner has no right of action on the bond unlawfully demanded by the Secretary of the Interior under the regulations prescribed by the Administrator of Public Works for Federal projects under the National Industrial Recovery Act.

To sum up, it will be observed that the Court in its opinion makes no significant difference between "public works" of the National Industrial Recovery Act program encompassing both Federal and non-Federal projects, and a "pub-

lic work *of the United States*" within the meaning of the Miller Act, the language of which restricts the giving of a "payment bond" to public works "of the United States" in conformity with the many decisions of the Court interpreting the scope of the lien laws. The failure of the Court to recognize the difference in scope of these two acts has led it into error.

III.

The Court Erred in Giving Any Consideration to What the Court Terms "'the Strong Equities' of Petitioner's Case", When No Basis Therefor Is Found in the Record.

The record in this case affords no basis for ascertaining what may be the "strong equities" of petitioner's case alluded to on page 6 of the Court's opinion. The premium of $8172.25 is shown to have been paid for the *performance* bond (R. p. 23) which protected the United States against the default of the prime contractor in case of non-performance of the contract. There is nothing in the record to show that any additional premium was paid for the *payment* bond sued on. It is entirely immaterial that respondent, Irwin & Leighton, did not protest against the giving of the bonds required by the Miller Act which were demanded as a condition for the award of the contract, for such protest evidently would not have deterred the Secretary of the Interior in requiring an improper bond in view of the contentions of the Solicitor of the Interior Department expressed as late as 1940 (R. pp. 23-25).

Moreover, the prime contractors, Irwin & Leighton, primarily responsible and liable on the bonds, as principals, are fully able to respond in full and save harmless its guarantor, the surety company, to any judgment obtained against them in a proper suit. This is shown to the Court by original affidavit filed herewith and printed as an Appendix to this brief. Irwin & Leighton hold in their hands to the credit of Cullen, Inc., its subcontractor, on three projects the sum of $13,293.04, a sum insufficient to pay the

obligations of Cullen, Inc. due to its creditors for materials supplied to said three projects totaling $41,832.50. Some of these creditors are protected by surety bonds but a great number of them are not and have resorted to attachments issued by the local courts against the funds in their hands. The rights of some of these creditors of Cullen, Inc. are wholly dependent upon the outcome of this suit because the funds retained are inadequate to pay them all and some of them have no direct right of action against respondents herein.

If the Court is to indulge in presumptions, it is suggested that it would be equally reasonable and fair to presume that respondents, Irwin and Leighton, are attempting to preserve the rights of other claimants as against the inflated claim of petitioner, as for the Court to remark upon respondents' acquiescence in the contracting officer's requirement of a payment bond as supporting a case of "strong equities" favorable to the petitioner. Respondents protest that the opinion in this respect is prejudicial to its reputation for fair dealing and ought to be corrected.

In view of respondent's defenses to the petitioner's claim on its merits, we remark that had this case reached this Court after a full hearing below we feel confident that the record would be convincing that the equities, if any, would be with respondents, Irwin & Leighton. Because respondents chose, prior to trial on the merits, to simplify the proceedings by interposing a seemingly complete legal defense to the right of petitioner to recover, as sustained by the lower Court, should not prejudice the Court in the determination of the narrow legal issues before it.

CONCLUSION.

Respondents submit that this Court's opinion in this case is manifestly so illogical in its results and in its uncertain effect upon the heretofore well established decisions of this Court establishing quite definitely the meaning of "public works of the United States," that to let this decision stand will only add to the confusion and perplexities faced by the very beneficiaries for whom the Congress enacted the Miller Act.

The Miller Act was intended to protect laborers and materialmen only on Federal projects belonging to the United States, who, prior to the Heard Act of 1894, had no recourse, redress or legal means of being secure in their claims. The Miller Act was enacted to supplement and not to conflict with State lien laws.

Inevitably the question will arise as to those having claims against "public works," which are not public works *of the United States* whether they must resort to the Miller Act or to the lien laws of the state for recovery. All precedents relative to the rights of third parties under construction bonds applicable to Federal and non-Federal Public Works are materially affected by this decision and their validity becomes uncertain. Hence its importance to the construction industry as well as to claimants.

The decision below, we submit, is correct and in consonance with the intent and meaning of the bond statute as reenacted by the Congress and with the prior decisions of this and other Courts construing it.

For said reasons, a rehearing should be granted to correct the evident error made by this Court in its failure to sustain the decision of the lower Court and to forestall an inevitable series of appeals as a result thereof.

Respectfully submitted,

PRENTICE E. EDRINGTON,
AMASA M. HOLCOMBE,
Attorneys for Respondents.

APPENDIX.

Commonwealth of Pennsylvania
City of Philadelphia

Before me, the undersigned authority, personally came and appeared ALEXANDER D. IRWIN, who, being duly sworn, deposes and says:

That he is a member of the co-partnership of Irwin & Leighton one of the respondents in the case of United States ex rel Noland Company, Inc. v. Irwin & Leighton, et al., No. 658, October Term, 1941, Supreme Court of the United States.

That Cullen, Inc., plumbing subcontractor, named in petitioner's complaint in the District Court, (R. 2) was a subcontractor for Irwin & Leighton on three simultaneous and contemporary projects, namely:

Veterans Administration Facility, Bath, New York.
Howard University Library, Washington, D. C.
Bryn Mawr College Dormitory, Bryn Mawr, Pennsylvania.

That at about the time said projects were nearing completion Cullen, Inc., gave Irwin & Leighton assurances that the funds withheld by Irwin & Leighton for Cullen, Inc.'s account were more than sufficient to pay all of Cullen, Inc.'s indebtedness for labor and material on said three projects, but before Irwin & Leighton released said funds to Cullen, Inc., or for their account, they were put on notice of alleged indebtedness due by Cullen, Inc., to various persons for material supplied said projects for amounts far in excess of the amount retained by Irwin & Leighton for Cullen, Inc.'s account, which at the present time is as follows:

Bath, New York, project	$1,435.40
Howard University Library project	4,628.74
Bryn Mawr College project	7,228.90
Balance due Cullen, Inc.	$13,293.04

The claims which were filed with Irwin & Leighton by material men who had supplied Cullen, Inc., are as follows:

Bath, New York, project—

Sundry claims aggregating	$3,600.00

Bryn Mawr College project—

Claims filed in the Philadelphia Courts accompanied by attachments against the funds in the hands of Irwin & Leighton, by

James M. Castle, Inc.	$247.73
C. J. Rainear & Co., Inc.	924.04
U. S. Pipe and Foundry Co.	306.80
Penn Pipe & Hanger Co.	115.18
Plumbers Supply Company	1,107.76
Walter H. Tinney Company	1,768.00
Johnson Service Company	1,550.00
Noland Company, Inc.	10,513.73
American Blower Corporation	928.50
American Air Filter Company	500.00
The Cheney Company	545.07
Tuttle & Bailey, Inc.	475.00
Welding Engineers, Inc.	400.00

Howard University Library

Noland Company, Inc.	12,502.55
Englehaupt Company	4,140.14
Powers Regulator Co.	2,148.00
Total claims of creditors of Cullen, Inc.	$41,832.50

That Irwin & Leighton has valid reasons in believing that the sum of $12,502.55 claimed by Noland Company, Inc., as the balance due it by Cullen, Inc., on the Howard University Library project is much in excess of the actual sum due, if any; and that the sum of $10,513.73 claimed by Noland Company, Inc., on a confessed judgment note given it by Cullen, Inc., and purporting to be the balance due it

on the Bryn Mawr College project is much in excess of the actual sum due thereon, if any, and for said reasons Irwin & Leighton have a valid defense on the merits of said claims.

That Irwin & Leighton, as principals on the bonds furnished in connection with any of the above construction contracts are well able to pay and discharge any legal liability due to said creditors of Cullen, Inc., without said creditors resorting to the surety on said contract bonds; that said surety is, therefore, a mere nominal defendant in said suits without risk of payment of any of said claims in its capacity as guarantor.

(s) ALEXANDER D. IRWIN.

Sworn to and subscribed before me this 23 day of April, 1942.

(s) THOS. R. BAILEY,
Notary Public.

(Seal)

My Commission expires 8/2/42.

SUPREME COURT OF THE UNITED STATES.

No. 658.—October Term, 1941.

United States of America; to the Use of Noland Company, Incorporated, a Corporation, Petitioner, *vs.* Alexander D. Irwin and Archibald O. Leighton, Trading as Irwin and Leighton, and United States Guarantee Company, a Corporation.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[April 6, 1942.]

Mr. Justice Byrnes delivered the opinion of the Court.

By Act of February 14, 1931,[1] making appropriations for the Department of the Interior, Congress authorized the construction of a library building at Howard University in the District of Columbia. The cost was not to exceed $800,000, of which sum $400,000 was made immediately available. Only a small part of this money had been used for architects' fees when the President, shortly after his inauguration in 1933, ordered impounded these and all other funds appropriated for construction.

Title II of the National Industrial Recovery Act of June 16, 1933,[2] created a Federal Emergency Administration of Public Works, with all of its powers vested in an Administrator. By § 202 the Administrator was directed to "prepare a comprehensive program of public works, which shall include among other things the following: . . . (c) any project of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public; . . ." And § 203 provided that "with a view to increasing employment quickly . . . the President is authorized and empowered, through the Administrator or through such other agencies as he may designate or create, (1) to construct, finance, or aid in the construction or financing of any public works project included in the program prepared pursuant to § 202; . . ."

[1] 46 Stat. ~~115~~ 1115, 1160.

[2] 48 Stat. 195, 201.

On August 24, 1935, Congress passed the Miller Act.[3] By the terms of this statute, "before any contract, exceeding $2,000 in amount for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States . . . a payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the

[3] 49 Stat. 793; U. S. C., Title 40, §§ 270a-d:

"Sec. 1(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as 'contractor':

"(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

"(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

"(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

"(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

"Sec. 2(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under this Act and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: Provided, however, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by

use of each such person." The Act also permitted persons who supplied materials and labor to bring suit on the bond in the name of the United States.

These are the statutes applicable to this dispute.

After the passage of the National Industrial Recovery Act, the Secretary of the Interior (who had been named Administrator pursuant to Title II) approved the library building at Howard University as a part of the public works program and allotted $1,120,811.58 for its construction. On December 5, 1936 the Assistant Secretary of the Interior, on behalf of the United States, entered into a contract with respondent, Irwin & Leighton, for the construction of the library building. As a condition of the contract, Irwin & Leighton was required to furnish a bond to secure the laborers and material men, under provisions of the Miller Act.[4] Accordingly, it posted such a bond in the amount of $408,618, with respondent United States Guarantee Company as surety.

Petitioner furnished to a sub-contractor materials worth $23,649.35. Of this sum it was paid $11,146.80, leaving due $12,502.55 with interest. When payment of this amount was refused, petitioner brought this suit on the bond in the name of the United States. Respondents moved to dismiss the complaint on the ground that the construction of the library building at Howard University was not a "public work", within the meaning of the Miller Act. The District Court overruled the motion to dismiss. The Court of Appeals allowed a special appeal and reversed, on the authority of its own earlier decision in *Maiatico Construction Co.* v. *United States*, 79 F. 2d 418. The case is here on certiorari.

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mailing the same by registered mail, postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

"(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit.

" . . . "

[4] Bulletin No. 51 of Federal Emergency Administration of Public Works, "Information Relating to the Negotiation and Administration of Contracts for Federal Projects under Title II of the National Industrial Recovery Act." (Revised, Oct. 1, 1935). Part I, § 2(a): "The forms required for general use in connection with construction and repair projects are as follows:

. . . U. S. Government Standard Form of Payment Bond No. 25A for the protection of labor and materialmen, pursuant to Public Act. No. 321, Seventy-fourth Congress, approved August 24, 1935 [The Miller Act]."

The question before us therefore is whether the construction of the library was a "public work" as that term is used in the Miller Act. We think that it is, that the Assistant Secretary of the Interior was consequently authorized to require respondents to post a bond securing materialmen, and that petitioner is entitled to sue on the bond in the name of the United States.

No aid in ascertaining the meaning of "public works" is to be found in the Miller Act itself. But in the National Industrial Recovery Act, passed two years before the Miller Act, Congress defined it as including "any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public." The library at Howard University was not only a project "*of the character* heretofore constructed or carried on . . . with public aid"; it had been directly and specifically authorized by Congress in 1931 and money had actually been appropriated for it. And it requires no discussion that Howard University, established by the authority of Congress "for the education of youth in the liberal arts and sciences,"[5] serves "the interests of the general public."

In *Maiatico Construction Co.* v. *United States, supra,* upon which the Court of Appeals principally relied in reaching an opposite conclusion, the same court had construed a different statute, the Heard Act of August 13, 1894.[6] That Act required that "any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required" to post a bond for the security of both the United States and the suppliers of labor and materials. It permitted the laborers and material men to enforce their claims by intervening in any suit by the United States on the bond. The plaintiffs in the *Maiatico* case supplied labor and materials in the construction of three dormitory buildings at Howard University, the contract for which had been let to the defendant construction company by the United States in November, 1930. The Court of Appeals decided that the plaintiffs could not recover on the defendant's bond because the dormitories were not "public buildings" and their construction was not a "public work." It based this conclusion on the theory that "public

5 14 Stat. 438.

6 28 Stat. 278, as amended by the Act of Feb. 24, 1905, 33 Stat. 811 and the Act of March 3, 1911, 36 Stat. 1167.

buildings" or "public works", within the meaning of the Heard Act, included only buildings which belonged to the United States. Since Howard University is a private institution and since it held title to the dormitories, recovery on the bond was denied to the suppliers of materials and labor.[7]

Whatever may have been the validity of this narrow formula when applied to the Heard Act, we cannot approve its application to this suit under the Miller Act. In the first place, the whole concept of "public works" has been considerably altered since the enactment of the Heard Act in 1894 and particularly within the last dozen years, and the question of title to the buildings or improvements or to the land on which they are situated is no longer of primary significance.[8] But we are not left to such vague guidance. Two and a half years after the execution of the contract involved in the *Maiatico* case, Congress, in the National Industrial Recovery Act, specifically defined "public works" as including "any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public." The Miller Act was passed two years later for the purpose of enlarging the protection which the Heard Act had afforded to laborers and materialmen by facilitating the procedure for enforcing their claims against the contractor. During the hearings on the several bills from which the Miller Act evolved, Congressman Duffy, of Ohio, the author of one of the bills and a member of the sub-committee that drafted the Act, declared without dissent by any Representative: "If this bill were passed by this Congress it would certainly be applicable to the public works program and that is the reason for its importance."[9]

We have no doubt that the Miller Act was intended to apply to the "public works" authorized by the Administrator under the National Industrial Recovery Act. The National Industrial Recovery Act did not leave to speculation the nature of the "public works" that Congress envisaged. Its language was not technical but plain and specific. Expressly included were "projects of the

[7] This emphasis upon title to the building or project or to the land on which it is situated finds support, as far as the Heard Act is concerned, in Guaranty & Trust Co. v. Crane Co., 219 U. S. 24; 23 Op. Atty. Gen. 174.

[8] See Peterson v. United States, 119 F. 2d 145, at 147-148.

[9] Hearings on H. R. 2068, H. R. 4027, H. R. 4231, H. R. 4461, H. R. 5054, H. R. 6018, H. R. 6115, H. R. 6677, H. R. 8519 (March 8, 22, April 26, and May 3, 1935), Committee on the Judiciary, House of Representatives, 74th Cong., 1st Sess., p. 71.

character heretofore constructed or carried on . . . . with public aid to serve the interests of the general public." Beyond question the library at Howard University was such a project.

The respondents evidently had no difficulty interpreting the language of the Recovery Act or the Miller Act until they were called upon to meet the claims of petitioner. The record does not reveal that Irwin & Leighton objected to posting the bond when the contract was executed. It paid a premium of $8,172.25 for the bond and the surety company accepted it without question. Presumably, these are the circumstances which caused the Court of Appeals to remark upon "the strong equities" of petitioner's case.

We hold that the Administrator had the authority to require the bond and that petitioner was entitled to bring this action on it. Holding this view, we find it unnecessary to consider the other questions raised by petitioner.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.